NO. 86-1436

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

YANKTON SIOUX TRIBE OF INDIANS,

Petitioner,

v.

STATE OF SOUTH DAKOTA, CHARLES MIX COUNTY, SOUTH DAKOTA AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS STATE OF SOUTH DAKOTA AND CHARLES MIX COUNTY, SOUTH DAKOTA

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QUESTIONS PRESENTED

1. Whether the Equal Footing Doctrine precludes the Yankton Sioux Tribe from obtaining aboriginal title to a navigable lake which had been held in trust by the United States for the state of South Dakota.

2. Whether the Treaty of April 19, 1858, 11 Stat. 743, clearly and definitely gave title to the bed of Lake Andes to the Yankton Sioux Tribe.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
SUMMARY OF THE ARGUMENT	1
REASONS TO DENY THE PETITIONS	3
I. The Eighth Circuit Court of Appeals correctly decided that once the Equal Footing Doctrine went into effect, only the finding of a recognized exception to the Equal Footing Doctrine could destroy South Dakota's title to the bed of Lake Andes.	
II. The Treaty of 1858 never expressly mentioned a conveyance of the bed of Lake Andes.	
CONCLUSION	10

TABLE OF AUTHORITIES

	PAGE
Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)	9
Heckman v. Sutter, 119 F. 83 (9th Cir. 1902)	8
Montana v. United States, 450 U.S. 544, 551, 554 (1981)	3, 4, 5, 7
Montana v. United States, 452 U.S. 911 (1981)	6
Pollard's Lessee v. Hagen, 44 U.S. 212, 222-223, 229 (1845)	3
Shively v. Bowlby, 152 U.S. 1 (1894)	4
Turtle Mountain Band of Chippewas v. United States, 43 Ind. Cl. Comm. 251 (1978)	7, 8
United States v. Holt State Bank, 270 U.S. 49 (1926)	4
U.S. v. Oregon, 295 U.S. 1, 14 (1935)	3
United States v. Romaine, 255 F. 253 (9th Cir. 1919)	8

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SUMMARY OF THE ARGUMENT

The Yankton Sioux Tribe could not have gained aboriginal title to the bed of a

navigable lake which was, under the Equal Footing Doctrine, held in trust by the United States for the future state of South Dakota. The only way a bed of a navigable lake may be conveyed subsequent to the bed achieving this trust status is by a definite and clear statement evidencing the intent of the United States to convey.

In the case of Lake Andes, there is no clear and definite statement that the United States intended to convey the bed of that lake to the Yankton Sioux Tribe in the Treaty of 1858. The Treaty does not mention Lake Andes and the fact that ~~the~~ lake is within the outer boundaries of the territory that was established as the Yankton Sioux Reservation does not meet the test needed to overcome the Equal Footing Doctrine.

REASONS TO DENY THE PETITIONS

I. The Eighth Circuit Court of Appeals correctly decided that once the Equal Footing Doctrine went into effect, only the finding of a recognized exception to the Equal Footing Doctrine could destroy South Dakota's title to the bed of Lake Andes.

The Equal Footing Doctrine was developed to ensure that new states to the Union would not enter the Union on an unequal basis compared to the original thirteen colonies. Under the Equal Footing Doctrine there is a strong presumption that the United States holds the beds of navigable waters within the territories in trust for the future states and that, upon the admission of the various states to the Union, ownership of these beds is transferred to state jurisdiction. Pollard's Lessee v. Hagen, 44 U.S. 212, 222-223, 229 (1845); U.S. v. Oregon, 295 U.S. 1, 14 (1935); Montana v. United States, 450 U.S. 544 (1981). The two cases which are most factually similar to this case; Montana

v. U.S., supra, and United States v. Holt State Bank, 270 U.S. 49 (1926), make it clear that the Equal Footing Doctrine applies with equal strength in cases in which the navigable waterway in question is located within the boundaries of an existing or former Indian reservation. This Court in Montana v. U.S. thoroughly analyzed the existing case law and restated the rules that are to be applied. The firm presumption in favor of state jurisdiction over the beds of navigable waterways can only be defeated when necessary for the United States: "To perform international obligations, or to effect an improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes for which the United States hold the territory." 450 U.S. at 551, quoting Shively v. Bowlby, 152 U.S. 1 (1894).

The United States will not be found to have conveyed the beds of navigable waterways unless there is "some special duty or exigency" and the intention to convey this property must be "definitely declared or otherwise made plain" or expressed "in clear and especial words." Montana v. U.S., supra, at 554. Under these rules, the burden is on the Tribe to clearly establish that the United States affirmatively and expressly conveyed the bed of Lake Andes to the Tribe under some special duty or exigency or, in the absence of an express conveyance, that the United States has in some other way made its intention clearly known. The Tribe failed to meet that burden.

Montana v. U.S. and the cases upon which that decision is based admit of no argument that the Tribe could obtain aboriginal title to the bed of a navigable waterway which was being held in trust for South Dakota. This

issue was argued in the Petition for Rehearing of the Crow Tribe of Indians in Montana v. United States (see Appendix) but the petition was denied. Montana v. United States, 452 U.S. 911 (1981).

In the case of Lake Andes, the evidence before the Eighth Circuit was that the Yankton Sioux Tribe did not begin migrating into the area which later became the Yankton Sioux Reservation until around 1810, only 48 years before the treaty was signed. This migration occurred seven years after the Louisiana Purchase, the time at which the United States began holding Lake Andes in trust for what was to become South Dakota. Since the Tribe did not obtain aboriginal title to the lake bed prior to 1803 South Dakota's title cannot be overcome unless aboriginal occupation can overcome the Equal Footing Doctrine.

None of the cases cited by the Tribe to support the argument that aboriginal title can be gained after the Equal Footing Doctrine has become effective are convincing. First, to the extent they conflict with Montana v. U.S. they are wrong. Second, none of the cases clearly establish that aboriginal title was gained after the Equal Footing Doctrine was in effect. The Tribe claims that in Turtle Mountain Band of Chippewas v. United States, 43 Ind.Cl.Comm. 251 (1978) aboriginal title was specifically found to extend to the beds of navigable waters and that the aboriginal title ripened after the United States acquired sovereign title. In fact, quite the opposite occurred. The Indian Claims Commission specifically did not award any compensation for the acreage found to be under navigable waters. That decision can only be ascribed to the fact that the Commission believed that the

Chippewas did not own the lake or river beds. Had the Chippewas owned the beds of these navigable waters they would have been entitled to compensation for the taking of those beds. Nowhere in the lengthy decision is there language supporting the argument of the Tribe on this issue. Turtle Mountain Band of Chippewas v. United States, 43 Ind.Cl.Comm. 251 (1978). The cases of United States v. Romaine, 255 F. 253 (9th Cir. 1919) and Heckman v. Sutter, 119 F. 83 (9th Cir. 1902) provide no guidance because in neither case was the date of attachment of aboriginal title litigated and therefore it is impossible to determine when aboriginal title became effective.

The law on this issue is clear; aboriginal title cannot be gained where the United States has begun holding the land in trust for future states. The only way a tribe can obtain title to navigable waterways

is for the United States to make its intentions to convey the title clear by express words in a treaty or through some special duty or exigency as was found in the case of Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

II. The Treaty of 1858 never expressly mentioned a conveyance of the bed of Lake Andes.

To avoid the strong presumption against conveyance, the intention of the United States to convey a lake bed must be made in clear and definite terms. The Tribe can point to no such terms in the Treaty of 1858, 11 Stat. 743.

The Tribe did not argue this issue below notwithstanding its allegation in footnote 9 of its Petition. The Tribe's argument below was that since the United States did not explicitly extinguish the Tribe's aboriginal title in the treaty, it therefore recognized the Tribe's title. This argument presupposes

that the Tribe already had aboriginal title. Since the proceeding section demonstrated that the Tribe never had aboriginal title to the bed of Lake Andes, this argument must also fail.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

THE STATE OF MONTANA, ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA AND
THE CROW TRIBE OF INDIANS, MONTANA,
Respondents.

PETITION FOR REHEARING

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TABLE OF CONTENTS

		Page
I.	The Tribe Had Aboriginal Title Before the United States Was Formed ----------	4
II.	The Crows' Aboriginal Title Included the Streambed -------	9
III.	Aboriginal Title May Not Be Extinguished or Interfered With By Any Authority Other Than That of the United States ----	14
IV.	The United States Has Never Extinguished the Crows' Aboriginal Title ----------	15
CONCLUSION ----------		21

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No. 79-1128

THE STATE OF MONTANA, ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA AND
THE CROW TRIBE OF INDIANS, MONTANA,
Respondents.

PETITION FOR REHEARING

Respondent, the Crow Tribe of Indians, respectfully petitions this Court for a rehearing of its decision entered on March 24, 1981. An extension of time to May 8 within which to file this petition was granted on April 13 by Justice Stewart.

Rehearing is requested because the Court did not settle one critical aspect of the Big Horn riverbed--it did not mention the Tribe's aboriginal title to it, which unless and until this Court says otherwise, is protected

by a large and consistent body of precedent followed for as long as this Court has sat. Presumably the Court would not intend such a protected title to be extinguished without at least some discussion of the protecting precedents.

The Court's opinion poses as the only ownership question in this case "whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the Treaties of 1851 or 1868" (emphasis added). Slip op. at 4. But no matter how that question is decided, it would not be relevant to the Tribe's aboriginal title to the riverbed, which does not arise from conveyance to the Tribe. The Court did deal with the Tribe's treaty title, and held the 1851 and 1868 treaties did not convey the bed to the Tribe. But even if the State acquired the fee to the riverbeds in the Crow Reservation, that fact does not, under the

precedents, extinguish the Tribe's aboriginal title to them.

The Tribe's aboriginal title was mentioned in our brief (pp. 9-11, 17), but not elaborated because it is of course eclipsed by the Tribe's more powerful 1868 treaty title, which was naturally the primary object of all three parties' attention. But if treaty title is peeled off, as it was by the Court's opinion, then the Tribe's underlying aboriginal title is exposed to view and must be dealt with.

If this Court does not deal with the Tribe's aboriginal title at this time, years of further litigation is inevitable, not only for the Crows, but for all other tribes

through whose reservations run navigable streambeds.[1]

I. The Tribe Had Aboriginal Title Before the United States Was Formed.

The Crows had aboriginal title to the land encompassed by their present reservation before the United States was formed, and ever since.[2]

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[1]Even if the Big Horn is legally "navigable," it is a shallow stream fit only for small boats, and bears no commercial traffic. In the 1870s it was not considered navigable in fact.

[2]The Indian Claims Commission has found that the Crows' territory described in the 1851 treaty (which includes the Crows' present reservation) was "held by them by aboriginal title." Crow Tribe v. United States, 3 Ind.Cl.Comm. 147, 151 (1954). The Commission cited the 1868 Treaty Commissioners' report that "These Indians have never founded the title to their lands upon the treaty of 1851. They have looked upon that treaty as a mere acknowledgement of a previously existing right in themselves." At p. 163. This Court has held likewise. United States v. Northern Pac. R. Co., 311

(Footnote Continued)

The theory of aboriginal Indian title, and its relationship to European concepts of title, is based on international law, as elaborated by the Court in several early opinions. E.g., Mitchel v. United States, 34 U.S. 711, 745-53 (1835); Johnson v. McIntosh, 21 U.S. 543, 572-84 (1823); generally, see Cohen, Federal Ind. Law 291-4 (1942). In the Americas, discovery gave the European powers control over the territory claimed against each other but not against the Indian tribes. The aboriginal Indian title--sometimes called a right of possession or occupation--was respected until extinguished by purchase or by just wars. Mitchel, supra, 34 U.S. at 745-46. Until so extinguished, it was good

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(Footnote Continued)
U.S. 317, 398 (1940) ("The fee of all this territory [Crows', among others] was in the United States, subject to the Indian right of occupancy").

against all the world except the new sovereign. Id.; Oneida Indian Community v. County of Oneida, 414 U.S. 661, 668 (1974); United States ex rel. Hualpai Indians v. Santa Fe Pac. R. Co., 314 U.S. 339, 345 (1941) (hereinafter the "Santa Fe" case). While the United States owns the underlying fee, it will only "take effect in point of possession when their [the Indians'] right of possession ceases." Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

These rules were absorbed into our law upon independence. Johnson, supra, 21 U.S. at 584-89. Under the Constitution, the sole right to extinguish aboriginal Indian title was vested in the national government. Oneida, supra, 414 U.S. at 667.

The doctrine of Indian title was accommodated to the land tenure forms of the common law by characterizing the underlying

ownership of the land as ownership of the fee, subject to the aboriginal Indian title.

> "Their [The Indians'] right of occupancy has never been questioned, but the fee in the soil has been considered in the government." Worcester v. Georgia, 31 U.S. 515, 580 (1832); Northern Pacific, supra, 311 U.S. at 398, quoted in note 2 above.

In the original thirteen States, the fee underlying Indian lands is usually owned by the States, as the Court established in Fletcher v. Peck, 10 U.S. 87, 142-43 (1810); see Oneida, supra, 414 U.S. at 670-71. In the West, the fee underlying Indian lands is usually owned by the United States. In either case the underlying fee may be conveyed to a private party, Fellows v. Blacksmith, 60 U.S. 366 (1856); Mitchel, supra, 34 U.S. at 745-46, but in all cases federal law protects the aboriginal Indian title until lawfully extinguished under federal authority. Oneida, supra, 414 U.S.

at 668-69; Fellows, supra. Until extinguished, the aboriginal Indian title is "as sacred as the fee simple of the whites." Mitchel, supra, 34 U.S. at 746; Santa Fe, supra, 314 U.S. at 345; Oneida, supra, 414 U.S. 669.

A tribe's aboriginal title exists without reference to any recognition or grant from the United States.

> ". . . a tribal right of occupancy, to be protected, need not be 'based upon a treaty, statute, or other formal government action.'" Oneida, 414 U.S. at 669, quoting from Santa Fe, supra, 314 U.S. at 347; also Cramer v. United States, 261 U.S. 219, 229 (1923).

When a tribe cedes some of its aboriginal lands under a treaty, and retains the balance, and the United States recognizes and guarantees the Indians' title to the balance (as is common and as happened with the Crows in 1868), the only thing "conveyed" by the United States to the tribe is

protection of the tribe's preexisting, aboriginal Indian title against an uncompensated taking by the United States itself. United States v. Sioux Nation, 48 U.S.L.W. 4960, 4972 n.29 (1980). In all other title respects, the treaty only confirms to the tribe what it already had. United States v. Winans, 198 U.S. 371, 381 (1905) ("the treaty was not a grant of rights to the Indians, but a grant of rights from them--a reservation of those not granted"), cited in Washington v. Fishing Vessel Assn., 443 U.S. 658, 678 (1979) and United States v. Wheeler, 435 U.S. 313, 327 n.24 (1978).

II. The Crows' Aboriginal Title Included the Streambed

The Crows' aboriginal title to their territory (including what later became their 1868 reservation) was established well before the United States acquired ownership of the underlying fee (Louisiana Purchase, 1803),

and so it cannot rationally be argued that any part of the Crows' territory, e.g., the streambed, was excluded from the boundaries of that title prior to acquisition of the fee by the United States.

Aboriginal title does not depend on actual use of every part of the territory claimed, Kootenai Tribe v. United States, 5 Ind.Cl.Comm. 456, 473-74 (1957); Coeur d'Alene Tribe v. United States, 4 Ind.Cl.Comm. 1, 20-23 (1955), but even so, the Crows aboriginally did use the Big Horn River. See Winters v. United States, 207 U.S. 564, 576 (1908) ("The Indians had command of the lands and the waters--command of all their beneficial use . . ."). Not only was it an integral part of the Tribe's religious tradition and ceremonial life, e.g., III J.App. 193; I J.App. 97-98, but the river's fish was a supplement to the Crows' main diet of buffalo, I J.App. 39, 58-59.

Their language contained words for fish and fishing, I J.App. 34, 58-59, an activity they performed using hooks made from bones, or spears, or fishtraps, I J.App. 97. Originally, they caught native species of catfish, ling and cutthroat trout, I J.App. 83.

The 1851 Treaty of Fort Laramie, 11 Stat. 749, was the first formal recognition of this activity. Article 5 stated that the Tribe intended, among other things, to maintain their right to fish:

> "It is . . . understood that . . . the aforesaid Indian nations do not . . . surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described."

Treaty Commissioner D. D. Mitchell said on the first day of negotiations that the treaty was

> ". . . not intended to . . . destroy your rights to hunt, or fish, or pass over the country, as heretofore." (Emphasis added)

Crow Tribe v. United States, 284 F.2d 361, 367 (Ct. Cl. 1960).

This treaty set aside a reservation of 38 million acres for the Crow Nation, including the River Crows, who were "addicted to . . . the pleasures of fishing." Crow Nation v. United States, 81 Ct. Cl. 238, 278 (1935).

Further, the Act of 1882, 22 Stat. 42, under which the Tribe ceded land, expressly provided that the diminished reservation should include existing fishing areas. II J.App. 175. The Commissioner of Indian Affairs instructed Felix R. Brunot, Chairman of the Special Commission assigned to negotiate the treaty, to

> ". . . include such fisheries as may be of value to the Indians as a means of furnishing them with supplies of food." II J.App. 100.

Water, in general, and the Big Horn River in particular, occupies even today a central position in the life and beliefs of

the Crow people. The traditional Crows believe that people were created from a mixture of riverbed mud and water. Water, which is one of nature's most powerful forces, with the ability to give and take life, is used in every traditional religious ceremony. Through the continuation of old customs such as "feeding" the Big Horn River in annual ceremonies, the Crows show their respect for the river and keep faith with the supernatural relevation, as related by Henry and Lloyd Old Coyote, to Big Metal after he had received his powers. The Big Horn River was so named by the Crows, and they have a traditional song dedicated to the River.

The Big Horn River--an integral part of the Crows' land, culture and language--is the very heart of the Crow people. The Crows' aboriginal use and occupancy of their land embraced the river, and they have continued that use to the present time.

III. Aboriginal Title May Not Be Extinguished or Interfered With By Any Authority Other Than That of the United States

In Worcester v. Georgia, supra, 31 U.S. at 558, this Court referred to the

> ". . . universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent: that their territory was separated from that of any state within whose chartered limits they might reside, by a boundary line, established by treaties: that, within their boundary, they possessed rights with which no state could interfere: and that the whole power of regulating the intercourse with them, was vested in the United States."

This is the reason why the Montana Statehood Act in 1889, 25 Stat. 677 (also

Mont. Code Annot. Ord. No. 1) provided that the people of the State:[3]

> ". . . forever disclaim all right and title . . . to all lands lying within [the State] . . . owned or held by any Indian or Indian tribes. . . ."

In other words, nothing Montana has done or could do would extinguish the Crows' aboriginal title. If there has been an extinguishment, it could only be by the hand of the United States.

IV. The United States Has Never Extinguished the Crows' Aboriginal Title

We are not aware of any argument that can be made that the United States has ever acted to extinguish the Crows' aboriginal

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[3]Similar language appeared in the Montana Territorial Act, 13 Stat. 85 (1864). See also the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. §§ 1311-1315, which granted all federal lands beneath navigable waters to the States but expressly excepted Indian-owned beds. 43 U.S.C. § 1313(b).

title, especially in light of the policy declared by this Court that it would take "plain and unambiguous action" to deprive the Indians of their aboriginal rights. Santa Fe, supra, 314 U.S. at 346 and 354; see Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968).

The mere conveyance to the State by the United States of its underlying fee title would not extinguish the Indians' aboriginal title. Beecher v. Wetherby, 95 U.S. 517, 526 (1877) (when Congress granted land in fee to Wisconsin, the State took "subject . . . to the existing occupancy of the Indians so long as that occupancy should continue"), cited and quoted with approval, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281 (1955). See also Buttz v. Northern Pac. Railroad, 119 U.S. 55 (1886) (Congressional grant of fee to railroad did not give the railroad the right to interfere with the Indians' aboriginal

title; accord, Santa Fe, supra, 314 U.S. 339 and United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938) ("Grants of land subject to the Indian title by the United States which had only the naked fee, would transfer no beneficial interest"); Johnson v. McIntosh, supra, 21 U.S. at 592 (Georgia, even though it owned the fee, could not convey title free of the Indians' right of occupancy).

Given this Court's decision that the United States granted the beds of navigable streams in the Crow Reservation to Montana when it became a State, this certainly would not operate to divest the Tribe's underlying aboriginal title, according to this Court's decisions in the above-cited cases. Accordingly, the Crows have "a legal as well as just claim to retain possession of it, and to use it according to their own discretion." Johnson v. McIntosh, supra, 21 U.S. at 574.

Nothing in United States v. Holt State Bank, 270 U.S. 49 (1926), is inconsistent. In that case the tribe had ceded its interest--aboriginal as well as treaty title--in the Mud Lake area in 1889, thus terminating any reservation. The question of lakebed ownership did not arise under after the lake was drained and the area settled by white farmers. The termination of the Chippewa Reservation is a controlling factual distinction from the Crow case, where the reservation is still intact and under the governance of the Crow Tribe, and mostly still owned by the Tribe or its members.[4] No

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[4]Other differences between this case and Holt State Bank are: There the tribe had no express treaty reservation, and the Minnesota Statehood Act had no express protection of Indian property. Interestingly, in Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), as in Holt State Bank, the body of water was no longer part of an Indian reservation, yet the

(Footnote Continued)

Tribe should be able to claim surviving aboriginal rights to an area it has ceded or voluntarily abandoned. See Santa Fe, supra, 314 U.S. at 357-8.

In Choctaw, supra, and Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), cases where this Court held that the tribes owned the beds (and which this Court reaffirmed in the instant case), the Indians did not have aboriginal title to their statutory reservations. They emigrated to the new reservations Congress established for them. Therefore, whatever rights they had did depend on what Congress gave them. Here, the Crows already had aboriginal title to their land, including the streambed, so that

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(Footnote Continued)
Choctaws were held to still own it, unlike the Chippewas. The consistency between those cases and the instant one is difficult to see.

their treaties gave them nothing more than they already had (except the right to be compensated for any future taking, a valuable right but not relevant here). As this Court has stated,

> ". . . the treaty was not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted." United States v. Winans, 198 U.S. 371, 381 (1905); cited in Washington v. Fishing Vessel Assn., 443 U.S. 658, 678 (1979) and United States v. Wheeler, 435 U.S. 313, 327 n.24 (1978).

CONCLUSION

Rehearing should be granted in order to dispose of the question whether the Crows still have aboriginal title to the streambed, as surely they do unless and until the precedents protecting that title are at least discussed. The opinion should be withdrawn

and the case set for reargument on the aboriginal title question.

Respectfully submitted,

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May 8, 1981